

## BETWEEN THE SPECIES

### On the Respectful Use of Animals

#### ABSTRACT

In his essay “The Integration of the Ethic of the Respectful Use of Animals into the Law,” David Favre begins to articulate a new framework for understanding the legal status of nonhuman animals. The present essay supports the broad contours of Favre’s framework, but raises challenges for some of the framework’s elements. The first half questions Favre’s claim that possession of DNA and the capacity for life underlie the need for a more robust conception of animal legal standing. The second half questions both Favre’s prior proposal that animals be deemed persons under law and his pragmatic suggestion that judges and scholars refrain from specific speculations about the moral status of animals.

JON GARTHOFF  
University of Tennessee, Knoxville  
[garthoff@utk.edu](mailto:garthoff@utk.edu)

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In “The Integration of the Ethic of the Respectful Use of Animals into the Law,” David Favre begins to articulate a new framework for thinking about the moral and legal status of nonhuman animals, which he calls the “respectful use” of animals. This notion of respectful use indeed appears promising; certainly it appears more promising, as Favre claims, than approaches which are concerned only with economic considerations or with respect for cultural practices. Favre’s framework comports well with existing law but also provides resources to reform law where it is inadequate. It helps explain why appropriate treatment of animals permits ownership of animals and some uses of animal labor. The broad contours of Favre’s sketch of how this ethic of respectful use is to be realized outside the law are also sensible, as are most of his more specific claims about how animals should be treated. As he plausibly argues, dogfighting is incompatible with respectful use and should be not be legally permitted, and the same is likely true of the declawing of cats.

That said, there are serious difficulties with Favre’s proposed grounding for the framework of respectful use. First there is his tracing of human and animal moral standing to the fact that they have DNA and are capable of self-replication, which—so far from Favre’s characterization as “not a matter of philosophy or debate”—is highly implausible. A machine might self-replicate, for example, without meriting our concern as such; and many viruses have DNA, yet it is far from clear that they have moral standing for that reason. More importantly, it borders on the grotesque to understand the moral status of humans and animals as derived from their status as “DNA packages.” The relation between the interests of humans and animals and the conditions under which they or their genes successfully replicate is complicated and obscure. But it is clear that the conditions

under which human and animal interests are best advanced can come apart from the conditions under which they or their genes best replicate, and where this is true it is surely a mistake to think the latter should dominate our concern. Examples to illustrate this point abound, but perhaps most dramatic is the fact of natural death, which is typically contrary to the interests of animals even where it conduces to replication of their DNA. (Even Richard Dawkins, I think, would allow that much.) And of course it bears mention also that in evolutionary theory there is wide disagreement concerning the relative significance of gene selection, as opposed to organism selection and group selection, as a force shaping humans and other animals.

But even if it is misguided to trace human and animal legal and moral standing to a capacity for self-replication or to the possession of DNA, Favre's hypothesis that life is the criterion of moral standing cannot be so quickly dispensed with.<sup>1</sup> (It is worth noting, however, that moving from gene replication to life as the source of moral status departs significantly from Favre's pragmatic and anti-theoretical motivations. Life is a capacity animals share with humans, much like its main theoretical competitors for the source of animal moral status: consciousness or sentience, desire or preference, and proto-rationality.<sup>2</sup>) It is a tricky matter to determine whether plants

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1 For some sophisticated defenses of this position, see Philippa Foot (2001), Richard Kraut (2007), and Michael Thompson (2008). I focus my discussion of life or possession of DNA as a putative criterion of moral standing on the problematic case of plants, but there are of course other problematic cases, such as early fetuses and intelligent extraterrestrial beings.

2 For defenses of animal moral status as derived from the value of rationality, albeit in two very different ways, see Allen Wood (1998) and Christine Korsgaard (2004). Wood and Korsgaard exemplify a recently renewed interest in the moral status of animals by Kantian moral theorists. Immanuel Kant's famous injunction never to use people as a mere means is itself a call for respectful use; see Kant (1785, 38).

merit our concern as such. It is certainly true that plants have interests, in the sense that there are things which enhance or detract from their flourishing. It is not so clearly correct, however, that plants have interests in virtue of being alive. We speak in an unstrained fashion of the flourishing of glaciers, hurricanes, and other functionally organized nonliving natural entities. We speak in a similarly unstrained way of things going well or poorly for functionally organized artifacts like cars. These may be merely metaphorical uses of “interests” and “flourishing,” but perhaps not, since we systematically use these terms in describing functionally organized things. When we apply these terms to things which are not functionally organized, such as heaps of sand, the use is more clearly metaphorical.

That it is not implausible to think of glaciers and cars as having interests points toward a second and more important complication for the hypothesis that life is the criterion of moral standing, namely that having interests and having moral standing are not clearly coextensive properties. When a thing has interests it makes sense to speak non-metaphorically of its well-being or flourishing; but when a thing has moral standing this entails more strongly that we have reasons (and obligations) to concern ourselves with its well-being or flourishing. Thus there is conceptual space for things which have interests but whose interests fail to generate reasons and obligations, and we must consider the possibility that plants fall into this category. One reason for thinking they do is that any reasons for attending to plant flourishing for the sake of plants themselves must be exceedingly weak, on pain of absurd implications. Plant interests must be systematically subordinated to the interests of humans and animals, for it is typically permissible and often rational to use and destroy plants for food, clothing, and shelter. One reason it is so difficult to discern whether there are reasons to

attend to the flourishing of plants as such is that there is always stronger reason to attend to plant flourishing: namely that this flourishing may contribute to the flourishing of a human or animal. (Note also that it is difficult to make sense of the notion of *cruelty* to plants.) These considerations militate toward the view that conscious awareness, not life, is the capacity which entitles animals to our concern.

Favre is right to worry that tracing animal moral standing to the capacity of consciousness risks fetishizing pleasure and pain in an account of animal flourishing. The best way to confront this worry is not to abandon consciousness as the criterion of moral standing, however, but rather to explain how this criterion is compatible with an understanding of animal flourishing as involving more than the mere intensity, duration, and valence of their experiential states.<sup>3</sup>

These concerns about positing life as the criterion of moral standing need not threaten Favre's subsequent claims about the integration into the law of the ethic of respectful use of animals, however, for these claims do not depend on that criterion; indeed they appear not even to make use of it. That is: if we substitute the view that it is in virtue of having conscious awareness that animals merit our concern for Favre's view that life is the relevant criterion, this need not change any of his more specific claims about legal and moral obligations concerning animals. While the general spirit of Favre's proposals is appealing, in the remainder of this essay I articulate some complications for these proposals.

Consider first the proposal, present in a previous draft of Favre's essay, that animals be deemed persons under the law. This proposal appears worthy of endorsement, insofar as it is needed

<sup>3</sup> For more on this point see Garthoff (2011).

to establish that animals are entitled to broader legal protection. But as Favre would no doubt agree, it would be absurd to suggest animals are liable under law or have responsibilities for upholding the law. Considering the legal status of animals thus exposes that the rights and responsibilities associated with legal personhood must be decomposed into constituent parts. More specifically it suggests that a legal system should distinguish those with rights or entitlements under the system from those with obligations or responsibilities under the system; and “personhood” seems a term well-suited to the latter, but not to the former, role. Thus it may be better to propose a new legal category, distinct from personhood, and include animals in this other category. “Animalhood” is perhaps better than it initially appears, as a term for picking out the things with this status; but whatever term is used, it must be made clear that it is a morally motivated category, tracking conscious awareness, and not a biological category, much less a phylogenetic category. This suggestion comes not so much in opposition to Favre’s proposal that animals be deemed legal persons but as a reformulation of it.

Note that such a legal category has important applications apart from animals. Fetuses, infants, and the very seriously mentally disabled ought to enjoy legal standing of some kind, but it is not clear it makes sense to treat them as persons with obligations and responsibilities under law. The separation of those with entitlements under law from those with obligations under law also may help to illuminate the brouhaha in the wake of the recent *Citizens United v. Federal Election Commission* decision (2009). Corporations are agents, and they should have legal personhood so they can be held accountable under the law for how they exercise their agency: corporations should be liable to civil lawsuits, and should perhaps be criminally li-

able as well. This may sound odd, since the principal function is to limit shareholder liability, mainly by guaranteeing that no corporate action can cost an individual more than she has invested in the corporation. Corporate personhood nevertheless makes corporations legally liable in ways they would not otherwise be. A corporation may be legally required to pay damages greater than any individual helping compose it can afford, for example, and it is legally possible to find that a corporation acted negligently without finding that any individual helping compose it acted negligently.

Notwithstanding these considerations favoring corporate legal personhood, corporations are not conscious, and so need have no legal entitlements apart from those of conscious individuals. It may be best, as a way to respect *individual* entitlements, to accord corporations certain legal rights; the right to enter into and enforce contracts is a paradigm example. But corporations should have no standing as such. Whatever rights and entitlements they have must derive from those of individuals, and their rights should not be granted when doing so is adverse to respect for humans and animals, as seems likely in the case of a putative corporate right to make political campaign contributions. Note that if these observations are correct, then the best way to express dissatisfaction with the judgment in *Citizens United* may *not* be to take issue with corporate personhood. This is only a preliminary word on a complicated subject, of course, but it appears promising to pursue.

Consider finally Favre's suggestion that we refrain from legislating *ex ante*, or indeed theorizing *ex ante*, what the respectful use of animals consists in; Favre claims we should instead leave this notion largely unspecified. The thought seems to be that it is best to fill this notion in with more specific content as

case law develops and cultural mores develop over time. Favre appreciates here what H. L. A. Hart called the “open texture” of law;<sup>4</sup> we should reject an understanding of adjudication as consisting in the algorithmic application of precisely formulated antecedent rules, and it is important for legal systems to refrain where possible from moral speculation far out of step with contemporary enlightened common sense. But there may be greater reason for judges and legal scholars to specify what unnecessary harm to animals consists in, or to specify what adequate care for animals consists in, than to specify (say) what due care when backing a car out of a driveway consists in. More specificity may be called for in cases involving animals because these cases may be less familiar to most people, especially in present social conditions where most people live in cities and suburbs, and so may require greater extension of our natural moral sensibilities. For these reasons it may be best for judges and legal scholars to articulate principles more specific than unnecessary use or inadequate care in an effort not only to encapsulate contemporary enlightened common sense but to help shape new moral sensibilities as they emerge. Here again this suggestion comes not in opposition to the spirit of Favre’s claims but as a distinct approach in the same broad family.

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<sup>4</sup> For more on this idea see Chapter VII of Hart (1961).



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